QUESTIONS PRESENTED

1. Is a purported offer of judgment, which is plainly not calculated to encourage settlement, a valid offer pursuant to Rule 68.

2. Does Rule 68, which requires the offeree to obtain a judgment, apply in cases where the Plaintiff does not prevail.

3. Does Rule 68 divest the District Court of its discretion to award costs in a Title VII case where the statute provides that District Courts "may" award costs to the prevailing party.

4. By failing to raise the issue in the Court of Appeals, did Delta waive its right to request this Court to reverse the Order of the lower courts which denied Delta its costs under Rule 54(d).

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In the
Supreme Court of the United States

October Term, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT ROSEMARY AUGUST

STATEMENT OF THE CASE

Respondent, Rosemary August ("Ms. August") was employed as a flight attendant by Delta Air Lines, Inc. ("Delta") on November 22, 1971; on August 27, 1975 she was discharged (Jt. App. p. 27). Ms. August appropriately pursued her administrative remedies and upon receipt of a notice of right to sue from the United States Equal Employment Opportunity Commission ("EEOC"), she filed a lawsuit in federal court on January 4, 1977, pursuant to Title VII of the 1964 Civil Rights Act, as amended ("Title VII"). Ms. August requested the relief accorded a prevailing party by Title VII: reinstatement,

back pay, benefits, other equitable relief, and costs, including attorney's fees (Jt. App. pp. 2-3, 19-20).

On May 12, 1977, Delta tendered to Ms. August a purported offer of judgment in the amount of $450 (Jt. App. pp. 33-34). She declined to accept the purported offer. Trial began September 22, 1977, and lasted 2½ days. The District Court entered its order in June of 1978 dismissing Ms. August's complaint with prejudice and ordered each party to bear their own costs. In so doing the District Court observed that:

> Standing unrebutted, this [Ms. August's] evidence would raise the necessary inference of racial bias. However, the evidence establishes that in equal numbers of cases, it was the Negro that benefited from a benevolent supervisor (Jt. App. pp. 31-32).

Delta subsequently presented a motion pursuant to Rule 68 of the Federal Rules of Civil Procedure seeking that Ms. August be ordered to pay Delta's costs incurred during the pendency of the lawsuit from May 12, 1977, until the date of its motion. The District Court denied Delta's motion noting that Ms. August's lawsuit was not wholly specious (Jt. App. p. 12).

Delta appealed the denial of its Rule 68 motion. A unanimous Court of Appeals for the Seventh Circuit affirmed the District Court's denial of Delta's motion and in so doing observed that Delta's offer of $450 "... is not of such significance in the context of this case to justify consideration by the plaintiff (Jt. App. p. 5). Delta petitioned for a rehearing *en banc*, this request was denied without dissent (Jt. App. p. 1).

At no time did Delta raise the issue of whether there had been an abuse of discretion by the District Court in its order which provided that each party would bear its own costs of litigation pursuant to Rule 54(d).

SUMMARY OF ARGUMENT

The language of Rule 68 is not so clear as to admit of no other interpretation than one which requires the mechanical shifting of costs whenever the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Delta seeks to bolster its position by unwarranted assertions that its construction comports with the history of the Rule and is consonant with the other provisions of the Federal Rules governing the assessment of costs. In rejecting Delta's theory the courts below correctly perceived that the mechanical implementation of the Rule urged by Delta only would serve to permit defendants to secure "cheap insurance against costs" and in no way would further the Rule's purpose of encouraging settlements. Accordingly, the lower courts agreed with Ms. August that in order to trigger the shifting of liability for costs of Rule 68, Delta's offer had to be reasonably calculated to lead to settlement.

As set forth in this brief, the rulings of the lower courts should be affirmed by this Court. Rule 68 has a single purpose: to encourage parties to settle cases before trial. This case graphically illustrates that the only way Rule 68 can operate properly is if an offer is reasonable. If not, the plaintiff obviously has no incentive to settle and the Rule is thus recast as a coercive tool for the defendant. As the lower courts found in this case, there can be no legitimate claim that Delta's offer was calculated to encourage settlement. Simply contrasting the $450 offer with the $20,000 actual damages incurred by Ms. August by the time Senior District Court Judge Julius J. Hoffman rendered his opinion belies Delta's claim that its offer was intended to foster settlement. To the contrary, the gross disparity cited above suggests that

the sole motivation underlying the offer was to insulate Delta from bearing its costs if it ultimately prevailed.

As is evident, Delta's construction, if adopted by this Court, would effectively transform Rule 68 from a tool to spur settlement into a means by which sophisticated defendants could shield themselves from bearing their own costs. That construction not only fails to achieve the purpose of the Rule, but acts to discourage settlement since the defendant can incur costs with impunity. It should be rejected by this Court.

There is a second, perhaps more fundamental, reason why Delta's attempt to stretch the language of Rule 68 to require Ms. August to bear its costs in this case must fail. Delta asks this Court to construe literally the word "must" in Rule 68 to require the mechanical shifting of liability for defendant's costs in every instance where a judgment is less favorable to the plaintiff than the defendant's offer. But in so arguing, Delta studiously avoids discussion of the context in which the word "must" appears. The sentence *in its entirety* provides that "[I]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." As the sentence clearly states, to invoke the Rule and to shift the liability for defendant's costs, the plaintiff has to obtain a judgment. Rule 68 simply has no bearing where, as here, the *defendant* prevails.

The history of Rule 68 reinforces this construction of the sentence as a whole and confirms that the Rule is designed to cover situations in which the plaintiff ultimately prevails, but wins less than the amount offered by defendant. The Advisory Committee Notes, the case law

developed pursuant to the state statutes which served as models for Rule 68, and the other state statutes which were forerunners of the Rule, uniformly indicate that the Rule is directed *only* against prevailing plaintiffs. Limiting the implementation of the Rule in the more modern federal context to instances where plaintiffs prevail also complements the structure of the Federal Rules. Rule 54 (d), the general cost provision, applies to cases where the defendant prevails. Rule 68 was promulgated to fill a gap in the Rules by affording a basis for assessing costs against a prevailing plaintiff. Delta's mechanical construction employing Rule 68 as a mace which operates automatically, not only conflicts with the plain language of the Rule, but is at odds with the Rule's history and the overall scheme of the Federal Rules. Accordingly, Delta's theory should be rejected by this Court.

One further consideration militates against Delta's argument. This is a Title VII lawsuit. As this Court has frequently recognized, Congress intended to "cast a [civil rights] plaintiff in the role of 'a "private attorney general," vindicating a policy that Congress considered of the highest priority, . . .'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978), *quoting Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). In light of the special role Congress has entrusted to Title VII plaintiffs, this Court has been particularly vigilant in safeguarding their access to the courts. E.g., *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974). Delta's interpretation of Rule 68, if adopted by this Court, will inevitably erode Title VII guarantees by chilling the victims of discrimination in going to court. Potential plaintiffs understandably will fear that if they go to court and lose, they will be saddled with the enormous costs that are incurred in

Title VII litigation by defendants, let alone their own costs if they lose. Here, in a case involving an individual claim, Delta ran up what Ms. August estimates to be at least $10,000 in costs.[1] That amount alone is enough to discourage the typical Title VII plaintiff, who is often unemployed, from vindicating his or her rights in court. Delta's construction of Rule 68 flies in the face of the strong policies underlying Title VII. It should be rejected by this Court.

Delta's argument that Rule 68 should apply in Title VII actions is also in conflict with Title VII's attorney's fee provision. The pertinent portion of 42 U.S.C. §200e-5(k) provides that "[I]n any action or proceeding under . . . [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .". In this instance Congress has specifically provided for the retention of discretion by the district courts for the purpose of assessing costs. Yet Delta argues that its purported offer of judgment divested the District Court of its discretion and required the court to mechanically grant Delta's motion for costs. In instances where Congress by statute has expressly determined the standards for awarding fees, Delta's argument should be rejected. Courts should not impose the Federal Rules in a manner which alters or abrogates statutory provisions. *See* 28 U.S.C. §2072.

[1] This figure is based on approximately $6,000 in costs incurred by Ms. August at trial, recognizing Ms. August's second copy of Delta's "same day" and "next day" order of Transcript and Delta's $2,300 in costs on appeal.

ARGUMENT

I.

THE DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT WHICH HELD THAT THE APPLICATION OF RULE 68 IS NOT MECHANICAL ARE CORRECT.

Delta's principle argument is that the plain language of Rule 68 is so clear that it compels the conclusion that Rule 68 requires the shifting of the costs of litigation in every case where a plaintiff fails to win more than the amount tendered by way of a purported offer from a defendant. This point is reiterated frequently throughout Delta's brief; but repetition does not make it so. On the contrary, this case illustrates that the cost-shifting provisions of the Rule are not triggered unless and until a defendant has tendered an offer reasonably calculated to encourage settlement.

At the outset, it is useful to briefly canvass the relevant facts. At the time of her discharge Ms. August had been employed by Delta for almost four years (Jt. App. p. 27). Ms. August's employment record was not substantially dissimilar from that of many of her co-workers. Nonetheless, during her employ with Delta she was singled out in a variety of ways. She was required to have a medical examination for venereal disease, she was suspended for seven days for serving a tepid cup of coffee despite the conclusion by her supervisor that the complaint was unjustified and her supervisor noted in a file review that she "should be watched."

When Ms. August was fired in August 1975, she believed that the underlying cause was race discrimination. Accordingly, without the assistance of an attorney, Ms. August filed charges with the EEOC. Following a lengthy investigation, the EEOC determined that Ms. August had "reasonable cause to believe" her allegations against Delta were true, and the EEOC issued a right-to-sue letter to her.

In January 1977, Ms. August commenced this lawsuit against Delta alleging that she had been discriminated against on the basis of her race. In her complaint she sought actual damages amounting to approximately $20,000, reinstatement, benefits, other equitable relief and costs, including attorney's fees. On May 12, 1977, after only the most preliminary discovery was completed, Delta purportedly offered Ms. August $450 in full settlement of the case. She declined to accept the offer.

Following a bench trial of 25 days, the District Court determined that although Ms. August had presented evidence which unrebutted would have been sufficient to raise the inference of racial bias, she had failed to carry the burden of proving the requisite discrimination in accordance with *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Accordingly, the complaint was dismissed and the District Court ordered both parties to bear their own costs.

Delta subsequently sought to recover its costs of litigation incurred following the date it tendered its purported offer of judgment to Ms. August. The District Court denied Delta's motion for costs pursuant to Rule 68 finding that in light of the extent of Ms. August's damages, which at the time of the District Court's ruling were approximately $20,000 in back pay alone, and in light

of the strength of her case on the merits, $450 "did not constitute an effective offer" and was "not at least arguably reasonable" (Jt. App. pp. 11, 12). The Court of Appeals affirmed the District Court's decision to deny Delta its costs pursuant to Rule 68, noting that Delta's purported offer did not ". . . justify serious consideration by the plaintiff" (Jt. App. p. 5).

Thus, the four judges to examine all the relevant factors in this case—the strength of Ms. August's case on the merits, Delta's defense, the extent of Ms. August's damages, and the timing and substance of Delta's alleged offer—have unequivocably stated that Delta's purported offer was not reasonably calculated to encourage settlement and, therefore, did not trigger the Rule.

Implicitly conceding that its offer was not intended to promote settlement, Delta rests on the contention that Rule 68 does not require defendants to act reasonably. According to Delta, all that is required to trigger the Rule is formal adherence to the procedures specifically set forth in the Rule. Delta even contends that an offer of $10.00 would be sufficient, provided the defendant complies with the mechanical terms of the Rule (Jt. App. p. 5). In espousing this theory Delta recognizes that as a practical matter the Rule, as it construes it, is little more than a haven for defendants who seek to shield themselves from the burden of paying their own costs.

It is beyond dispute that the purpose of Rule 68 is to promote settlement and to avoid protracted litigation. 7 Moore's Federal Practice, Second Edition, ¶68.02, *quoting* the 1946 Advisory Committee's Note to Amended Rule 68. Delta's mechanical theory serves no such purpose. There is no more basic principle of construction than the one Delta seeks to avoid, *i.e.*, a statute or rule must be construed to effectuate its purpose. Here, as both lower courts prop-

erly recognized, the only way to construe Rule 68 in accord with its objectives is to find that purported offers, which in light of the facts surrounding the particular case are not objectively calculated to induce settlement, do not trigger the Rule. As one commentator noted, the only way the Rule makes sense is if it assures that the defendant will act reasonably. Note, *Rule 68: The "New" Tool for Litigation*, August, 1978 Duke L.J. 889, 893-895. Not only is this construction fully consonant with the purpose of the Rule, but it serves the goals enunciated in Rule 1, Fed. R. Civ. P.

> They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 68 as applied by the lower courts in this case will force parties to assess their chances at trial realistically. Once a reasonable offer is tendered, a plaintiff will be confronted with the question Rule 68 is designed to force: whether the exposure to liability for the opponent's costs outweighs his or her own expected recovery.

In making an offer that will trigger the Rule the defendant must perform the same intricate calculus plaintiff must perform in attempting to apprehend the likelihood of success on the merits. While Rule 68 is intended to tip the balance in favor of settlement, it in no way is intended to be the mace Delta envisions.

The case law supports Ms. August's position. In *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980), the court rejected the defendant's contention that Rule 68 precluded examination of the facts surrounding the litigation in determining whether a purported offer of judgment was effective. The court determined that in light of the fact that the case had been certified a class action and involved several novel

issues, an offer of judgment directed to the named plaintiffs would not prevent the court from denying costs. This case follows the great weight of case law on the issue. In *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661 (E.D. La. 1976), the court spoke of Rule 68 as a "procedure whereby a defendant may offer what is really due, and put the burden of costs on the plaintiff . . . to prevent a plaintiff from forcing a defendant to pay costs by making an exorbitant demand." 429 F. Supp. at 666. Earlier, in *Honea v. Crescent Ford Truck Sales*, 394 F. Supp. 261 (E.D. La. 1975), the same court said that Rule 68 was triggered "if a reasonable offer is spurned" and that "[d]efendants should be encouraged to respond to a well founded claim with a reasonable offer." 429 F. Supp. at 262, 263. *See also, Rondo v. Lane*, 10 Ohio St. 2d 259, 227 N.E. 2d 197 (1967).

In the most thoughtful of those cases to apply Rule 68, *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 697 (E.D.N.Y. 1974), the court held that "a preliminary finding is required that an appropriate offer of judgment has been made," and it concluded that because the offer "afforded the plaintiff substantially the relief prayed for in its complaint", it was a "proper offer". 63 F.R.D. at 699. It was reasonable.

Were Delta to have offered Ms. August $456 and reinstatement, a remedy analogous to a promise to desist from infringing on a patent or copyright as in *Mr. Hanger*, it might have been able to convince the District Court that its offer was reasonable. As the District Court noted below:

> [W]hile the court did ultimately find itself constrained to enter its judgment for the defendant, the court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this court, and in

> the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally 'acking in merit or were there additional factors which would mitigate in favor of defendant. (Jt. App. p. 12).

It is obvious that the relevant context for determining the reasonableness of an offer of judgment sought to be implemented against plaintiff is the point in time at which the offer is made, not at the time of determination on the merits. Once the plaintiff has lost, *any* offer looks good by comparison. As Mr. Justice Stewart noted in *Christiansburg Garment Co.* v. *EEOC*, 314 U.S. 412 (1978):

> . . . it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. 314 U.S. at 422.

The question is, did Delta's offer serve the purpose of Rule 68 on May 12, 1977, or was it merely an attempted manipulation of the Rule for a far less noble purpose? As the Court of Appeals observed, the purported Rule 68 offer of judgment ". . . is not of such significance in the context of this case to justify serious consideration by this plaintiff" (Jt. App. p. 5).[2]

[2] Every court except one to consider Rule 68 has specifically discussed the reasonable nature of the purported offer prior to determining whether or not its implementation is warranted. In *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978), the reasonable nature of the offer was not addressed by the Court. The key to resolving disputes in litigation is compelling both parties to assess their case before trial realistically. This will be accomplished only where a defendant's offer is reasonable.

Delta suggests its purported offer tendered to Ms. August was based on the fact that Delta knew it had not discriminated against her, and Delta argues the purported offer was more than reasonable because it was more than Ms. August deserved when measured against the outcome of the case.[3] Delta did prevail. But as this Court knows and most courts recognize, the outcome of litigation is the result of many different factors.

Defendants do not prevail just because they are right, and plaintiffs do not lose just because they are wrong. The result of any lawsuit hinges on a number of factors which include, but are not limited to: witnesses may fail to appear because they do not wish to cooperate, subpoenas were not served, or they were unavailable for reasons beyond their control; counsel may not be sufficiently skilled or prepared; discovery may have been incomplete; witnesses may be nervous and present themselves poorly; witnesses may not tell the truth; records may be destroyed or missing; counsel may make incorrect strategic decisions; the trier of fact may not ascertain the proper issues or understand the particular law(s) in question. As this Court has observed recently, ". . . seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978). Certainly this case was not entirely unfounded. Both the District Court and the Court of Appeals recognized that this lawsuit was not specious or frivolous (Jt. App. pp. 12, 18, 31). But rather as the District Court observed, Ms. August at least had presented a *prima facie* case (Jt. App. p. 31). Viewed in this light, Delta's claim that its offer was reasonable is simply untenable.

[3] It is of interest to note that Delta has made precisely the same purported offer of judgment in the amount of $450 in a subsequent Title VII case.

II

BY ITS TERMS RULE 68 ONLY APPLIES TO PLAINTIFFS WHO PREVAIL

Rule 68 provides that "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." (Jt. App. p. 36). Delta's insistence upon a restrictive reading of certain words contained in Rule 68 is an attempt to avoid the logical, historical and proper application of the Rule. Hiding behind dictionary definitions only obscures the real question of how to effectuate the purpose of the Rule. Rule 68 is explicit. It operates where a plaintiff obtains a judgment. Ms. Angust did not obtain a judgment. As one commentator observed, "[I]t seems implicit in the language of the rule that the plaintiff must prevail." Note, *Rule 68: The "New" Tool for Litigation*, Angust, 1978 Duke L.J. 889, 890.

Indeed, the meaning of Rule 68 can be construed properly only when viewed in the complete context of its history, the application of its state forerunners, and its function in conjunction with the other Federal Rules.

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory history no matter how "clear the words may appear on 'superficial examination.'" *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44. *See also United States v. Dickerson*, 310 U.S. 554, 562; *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

As this Court also has noted:

> But that rule [the so-called "plain meaning" rule] has not dominated our decisions. The contrary doctrine [examination of legislative history] has prevailed. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955).

An analysis of the substantive history of Rule 68 precludes the application of the Rule as Delta urges.

As Delta has indicated in its brief, the Advisory Committee Notes at the time of the creation of the concept of offer of judgment in federal law in 1938 referred to three state statutes: Minnesota, Montana and New York (Pet. Br. p. 8), 12 *Wright and Miller, Federal Practice and Procedure* §3001 (Rev. Ed. 1973). These statutes are similar in language to Rule 68. 2 Minn. Stat. (Mason, 1927) 9323; 4 Mont. Rev. Codes Ann. (1935) 9779; N.Y.C.P.A. (1937) 177. Under these statutes, the case law indicates that there has never been a single reported instance where these statutes have been applied to impose the payment of a defendant's costs on a plaintiff where the plaintiff had not prevailed as a result of the litigation. Indeed, on each occasion where these "Rule 68" forerunners were utilized to assess costs at the conclusion of a lawsuit, the plaintiff had prevailed but had been less successful in the judgment obtained than the offer previously made by defendant.[4]

In no case cited under any of these three statutes is there any indication that an unsuccessful claimant falls within

[4] *See Watkins v. W. T. Nesler Co.*, 135 Minn. 343, 160 N.W. 864 (1917) (plaintiff obtained $31.25 and costs; defendant offered $31.25 and costs); *Woolsey v. O'Brien*, 23 Minn. 71, 72 (1876) (plaintiff obtained something less than defendant offered); *Petrosky v. Finnegan*, 38 Minn. 26, 35 N.W. 665 (1887) (plaintiff obtained $50; defendant offered $50); *Morris-Turner Livestock Co. v. Director General of Railroads*, 266 F.2d 600 (D. Mont. 1920) (plaintiff obtained something less than defendant offered); *Smith v. New York, O. & W.R.R. Co.*, 119 Misc. 506, 196 N.Y.S. 521 (1922) (plaintiff obtained something less than the $436.40 offered by defendant).

[illegible] the provision of the [illegible] rule. The conclusion must be that the Advisory Committee drafted a rule similar in [illegible] the statutes which had operated successfully according to the statutes, [illegible] and the Committee expected the new rule to be interpreted and applied in the same manner in which its predecessors had been [illegible].

Delta acknowledged in its brief before this Court that the statutes cited by the Advisory Committee were not the [illegible] statutes existing prior to the adoption of Rule 68 [illegible] with [illegible] of Rule 68 in 1938. [illegible]

[illegible]

[illegible] (footnote continued)

The Honorable Robert G. Dodge, a member of the Supreme Court Advisory Committee and one of the original framers of the Rule, when speaking at the Institute on the Federal Rules, stated that Rule 68:

> affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance. He may then make an offer of judgment of the amount which he concedes is due and unless the plaintiff recovers more than that the plaintiff gets no costs accruing after that offer of judgment. Proceedings of the Institute of Federal Rules, p. 337.

Dodge understood Rule 68 as the previously enacted state statutes had been applied, i.e., as a mechanism designed (1) to protect a prevailing plaintiff, who could have accepted an appropriate offer, from recovering what ultimately has been determined to be costs spent in support of a demand that exceeded a reasonable recovery, and (2) to enable a defendant to recover the costs it incurred subsequent to the making of an appropriate offer.

(footnote continued)

[illegible] plus interest, the total of which exceeded $117 [illegible]; *Fowler v. [illegible]*, [illegible] Ind. [illegible] (1866) (plaintiff obtained $15, defendant offered $15); *West v. Springfield Fire and Marine Insurance Co.*, 105 Kan. 414, 185 P. 12 (1919) (plaintiff obtained [illegible], defendant offered [illegible]); *Weckmuth v. Orient Insurance Company*, [illegible] Neb. [illegible] (1898) (plaintiff obtained [illegible], defendant offered [illegible]); *Herring-Hall-Marvin Safe Co. v. Balliet*, 44 Ore. 91, 74 P. 476 (1903) (plaintiff obtained [illegible], defendant offered [illegible]); *Hammond v. Northern Pacific Rail Company*, 23 Or. 157, 31 P. 299 (1892) (plaintiff obtained [illegible], defendant offered [illegible]); *Sioux Falls Adjustment Co. v. Penn Soo Oil Co.*, 53 S.D. 77, 220 N.W. 146 (1928) (plaintiff obtained less than offer, defendant offered $561.91); *Newton v. Allis*, 16 Wis. 210 (1862) (plaintiff obtained [illegible] plus $50, defendant offered $750 plus $50 per year).

Dodge's interpretation of Rule 68 is further endorsed by another commentator, Walter P. Armstrong, who approved of the following proposed amendment to Rule 68 to clarify any ambiguity in the original Rule:

> . . . no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree, and that he should pay costs from the time of the offer. 4 F.R.D. 124, 126 (1944).

The analyses of Armstrong and Dodge make sense only when Rule 68 is understood as applicable to plaintiffs who spurn an offer of judgment, who go on to prevail at trial, but who are not more successful at the conclusion of the litigation than they would have been had they accepted the offer and as a result had been considered the prevailing party entitled to recover all costs of litigation but for a rule to the contrary.

Rule 54(d) presently provides that the court has discretion to award costs to the prevailing party:

> . . . costs shall be allowed as of course to the prevailing party unless the court directs otherwise. Fed.R.Civ. Pro. 54(d).

Delta feigns concern in its brief for the integrity of the Federal Rules of Civil Procedure as a cohesive unit. Yet the result Delta seeks would be destructive to the complementary nature of Rules 54(d) and 68. The Rules are meant to work together: Rule 54(d) setting forth the general rule as to the costs and prevailing parties (the modern replacement of the common law rule that unsuccessful parties pay opponent's costs), deferring to Rule 68 under certain circumstances.

Prior to the adoption of the Federal Rules, costs incurred by a prevailing party were uniformly paid by the unsuccessful opponent. Note, *Costs in Common Law Ac-*

tions, [illegible] (19[illegible]). The modern replacement of this common law rule, Fed. R. Civ. Pro. 54(d), provides that the recovery of costs by the prevailing party be subject to the discretion of the District Court. Rule 68 was designed complementarily with Rule 54(d) to discourage [illegible] by plaintiffs who are assured of prevailing to some extent and who attempt to recover more than they [illegible] by the knowledge that they virtually are guaranteed recovering their costs of litigation. Its application of Rule 68 in conjunction with the other Federal Rules would relieve a defendant of the burden of paying plaintiff's costs when plaintiff unreasonably rejects an offer of settlement. The discretion of the court afforded by Rule 54(d) with respect to totally unsuccessful plaintiffs and totally successful defendants would be left intact.

III

DELTA'S MECHANICAL THEORY OF RULE 68 CLASHES WITH THE POLICIES UNDERLYING TITLE VII, AND IT DOES NOT CONFORM TO THE SPECIFIC LANGUAGE OF TITLE VII'S COST PROVISION

Delta's argument conspicuously glosses over the fact that this is a Title VII lawsuit. In so doing, Delta seeks to avoid acknowledging that Rule 68 does not govern the assessment of costs in this case, but rather that 42 U.S.C. §2000e-5(k), which allows a prevailing party in Title VII actions to recover costs, including attorney's fees, from the losing party, determines the award of costs here. Title VII provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. §2000e-5(k).

The statutory language could hardly be more explicit. Nowhere does the statute speak in mechanical terms. To the contrary, this Court indicated in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 that ". . . the permissive and discretionary language of the statute does not even invite, let alone require . . . a mechanical construction."

This Court has been responsive to Congressional concern in this area recently observing that assessments against plaintiffs ". . . simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978).

The wisdom of Congress' decision to provide this discretion for awards of costs and attorney's fees is evident in Ms. August's case. Following her discharge, Ms. August, not unlike other such plaintiffs, was unable to obtain similar employment. At best she found intermittent jobs as a sales person. At the time of trial she was unemployed. Ms. August had lost her health benefits which were significant to her because of a chronic illness. She also had lost a number of other benefits which either she could not afford or it was impossible to replace. Her only hope to recoup her financial losses and remove the tarnish on her employment record, was to bring a Title VII lawsuit to win back what she felt had been unjustly denied her. She tried, and she lost. She did not win anything and ultimately had to bear her own substantial costs of litigation. Nowhere in the opinion of either lower court was there a suggestion that Ms. August had brought or pursued her case in bad faith. No judge determined that her case was frivolous, vexatious, or groundless.

To saddle this plaintiff with the extensive costs that Delta ran up as its costs after May 12, 1977, inevitably would undermine Title VII goals. If unsuccessful Title VII plaintiffs were routinely forced to bear a defendant's costs in addition to their own, and indeed the vast majority would be, given Delta's mechanical insurance program, few allegedly aggrieved parties would be in the position to advance the public interest espoused by Congress in Title VII by bringing lawsuits to vindicate public policy observed in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). In this case the District Court noted that Ms. August's evidence unrebutted would have been sufficient to support her claim, and the Court of Appeals supported the lower court opinion. She is therefore within the class of persons Title VII was intended to protect and to encourage to seek redress in the courts.

In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), this Court repeatedly emphasized that the decision of whether to tax costs and attorney's fees was within the discretion of the district court, terming the statutory language "permissive and discretionary". 434 U.S. at 418. The Court noted that its conclusion was consistent with the overall purpose of the provision, which was enacted to encourage individuals allegedly injured by racial discrimination to seek judicial relief. *Id.; see also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 401-402 (1968); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975). While the Court recognized that the costs and fee provision also served the function of discouraging groundless suits, it cautioned that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate after

it clearly became so." *Christiansburg*, *supra*, 434 U.S. at 422. This case is a Title VII lawsuit. Its statutory provision concerning costs must govern and Rule 68 should not be construed to cut back on Congress' specific direction to the lower courts to exercise their discretion in these matters carefully to best effectuate the goal of the statute. See, 28 U.S.C. §2072. In denying Delta its costs, the courts below applied the standard set down in *Christiansburg* and ruled that since the plaintiff had made out at least a colorable claim on the merits, each side would bear its own costs.

The decisions of the lower courts are plainly in keeping with the objectives of Title VII and 42 U.S.C. §2000e-5(k) and should not be disturbed by this Court.

IV.

THIS COURT NEED NOT ADDRESS DELTA'S UNSUPPORTABLE CONTENTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION UNDER RULE 54(d).

Evidently recognizing the flaws in its Rule 68 argument, Delta falls back to argue that even if the lower courts properly construed the application of Rule 68, this Court should substitute its judgment for that of the District Court with respect to the question of whether Delta was entitled to its costs pursuant to Rule 54(d). Delta's contention is wrong for three reasons. First, Delta did not raise this argument before the Court of Appeals. The question is not jurisdictional in nature. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Dugan* v. *United States*, 274 U.S. 195, 200 (1927); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980).

Second, even if this question were properly before this Court, Delta's contention is unsupported. The broad latitude afforded district courts in the taxation of costs has long been recognized by this Court. *E.g.*, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964).

Third, Title VII plaintiffs are entitled to special protection with respect to the assessment of litigation costs. This Court has characterized the Title VII plaintiff as the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority". *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), *quoting Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). In denying Delta its costs at the close of the case, the District Court determined that had the evidence Ms. August presented in her Title VII case gone unrebutted, it would have raised the necessary inference of racial bias for her to prevail. When the District Court addressed Delta's subsequent motion for costs pursuant to Rule 68, it reiterated that its decision on the merits with respect to costs was premised on the fact that this was not a wholly specious case and that it was a civil rights case (Jt. App. p. 12).

None of these findings are erroneous, let alone clearly so, nor do they constitute an abuse of the District Court's discretion. Therefore, the decision of the District Court denying Delta's costs should be affirmed.*

*A number of the Amici in this case have indicated that they intend to file briefs advancing the argument that Delta's purported offer failed for technical reasons, noting that Delta's offer could not have included attorney's fees required as an award of costs by Title VII. As this argument will be presented in detail by Amici, Ms. August will not address this issue.

CONCLUSION

As set forth above, the mechanical construction of Rule 68 urged by Delta would not encourage settlement; rather it would have the opposite result of prolonging litigation by providing defendants "cheap insurance against costs". Moreover, both the language and the history of the Rule strongly support Ms. August's contention that the implementation of the Rule in this case is inappropriate because the Rule operates only in instances where a plaintiff has obtained something by way of judgment, albeit less than the amount offered by defendant. Since her case was dismissed and Ms. August did not obtain any relief, Rule 68 is inappropriate.

Delta has responded to Ms. August's position stating that the precise words of the Rule are so clear that the Court may not stray from Delta's mechanical interpretation. Thirty-five years ago in *Cabell* v. *Markham*, 142 F.2d 737, 739 (2d Cir.), *aff'd*, 327 U.S. 404 (1945), Judge Learned Hand addressed a similar argument. His observations were as timely today as they were then:

> The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.
>
> Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute. . . . As Holmes, J., said in a much-quoted passage from *Johnson* v. *United States*, 163 F. 30, 32, 18 L.R.A., N.S., 1194: 'it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most

> reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. (Citations omitted).

Thus, it is clear that Delta's mechanical interpretation would undermine the purpose of Rule 68. The allegedly clear language of the Rule does not compel the results urged by Delta. The purpose of the Rule requires that Delta's perspective be rejected.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed and the costs of all appeals taxed against Delta.

Respectfully submitted,

Susan Margaret Vance
Glazer & Vance
179 West Washington Street
Chicago, Illinois 60602
312/263-4717

Carole K. Bellows
Reuben & Proctor
11 South La Salle Street
Chicago, Illinois 60603
312/558-5500

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